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Communities of Arizona and Michael A. Parham

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

Supreme Court No. R-16-0040

PETITION TO AMEND THE
RULES OF PROCEDURE FOR
EVICTION ACTIONS

COMMENTS ON PROPOSED
FORMS AND RULE

INTRODUCTION

Forcible detainer is a statutory action. The procedural provisions of the forcible detainer statutes are an integral part of the right itself and are not solely procedural. *Hinton v. Hotchkiss*, 65 Ariz. 110, 116, 174 P.2d 749, 753 (1946). As the Court held in *Tri-City National Bank v. Grady*, 312 P.3d 117 (App. 2015), a procedural rule, even one subsequently enacted, cannot supersede or repeal a substantive right, citing *DVM CO. v. Stag Tobacconist, Ltd.*, 137 Ariz. 465, 466, 671 P.2d 907, 907 (1983) ("forcible entry and detainer is a statutory proceeding, the object of which is to provide a summary, speedy and adequate means for obtaining possession of premises . . .).

The revised ACAJ forms continue to be too long, badly drafted, and to impose requirements on landlords not in the relevant statutes. Landlords using forms consistent with the statutes would face dismissal of cases if court forms containing extra information were

1 not used. The place to lawfully impose additional requirements on landlords is at the
2 Legislature, not the Rules Forum.

3
4 Tenant and consumer advocates have created this Proposal and the ACAJ has adopted
5 it. In the process it has chosen to pick a fight with the landlord industry that is now taking
6 place at the Legislature. Regardless of the outcome, relations with that important industry
7 will suffer for years to come.¹

8
9 Accompanying this are selected notice and pleading forms showing in yellow matters
10 required by statute, and in turquoise information not provided by statute required in the
11 ACAJ revised forms.

12
13 **THE REVISED FORMS EXCEED STATUTORY REQUIREMENTS AND ARE**
14 **CONTRADICTORY AND INCONSISTENT WITH THE LAW**

15 **A. RELEVANT LAW**

16 **In General.** The Arizona Constitution identifies the three branches of government—
17 legislative, executive, and judicial—and requires they “shall be separate and distinct, and no
18 one of such departments shall exercise the powers properly belonging to either of the
19 others.” Ariz. Const. art. III. In 1939 the Arizona Supreme Court was empowered by statute,
20 A.R.S. § 12-109, and then by the constitutional amendment of November 8, 1960, to make
21 rules relative to all procedural matters for courts within the State of Arizona. Ariz. Const.
22 art. VI, section 5 as amended; *State v. Birmingham*, 96 Ariz. 109 (1964).
23
24

25 Effective January 1, 2009 the Court adopted the Arizona Rules of Procedure For
26 Eviction Actions (RPEA). RPEA 1 states: "These rules shall govern the procedure in the
27

28 ¹ HB 2237 would restrict courts from imposing mandatory notice forms and pleading requirements when other forms
will satisfy statutory requirements. Available on line at <https://apps.azleg.gov/BillStatus/BillOverview/68752>.

1 superior courts and justice courts involving forcible and special detainer actions, which are
2 jointly referred to in these rules as 'eviction actions.' ” They are concerned with *procedural*
3 matters governing forcible and special detainer (eviction) actions.
4

5 The RPEA do not prescribe any specific forms for litigants to use in these cases.
6 RPEA 2 however provides: "These rules shall be construed in accordance with statutory
7 provisions related to forcible entry and detainer actions and special detainer actions. *All*
8 *eviction actions are statutory summary proceedings and the statutes establishing them*
9 *govern their scope and procedure*" (emphasis added).
10

11 **Notice Forms.** The notice forms are substantive, not procedural. They must meet
12 statutory content requirements under landlord-tenant, detainer statutes, and the RPEA. Under
13 RPEA 5 a copy of the notice on which the action is based must be attached to the Complaint.
14 Under RPEA 13 (a) (2) the trial court must "[d]etermine whether the tenant or occupant of
15 the premises received proper termination notice if one was necessary, and was afforded any
16 applicable opportunity to cure." Under current statutes and rules, for eviction judgments to
17 be entered a court must find that the notice meets statutory requirements and the tenant was
18 given statutorily mandated opportunity to cure the default.
19
20

21 **Pleading and Practice Forms.** The Summons, Complaint and Judgment are
22 procedural and the Court has the authority to impose requirements covering them. However
23 the current proposed forms exceed requirements of the forcible and special detainer statutes.
24

25 **Interplay Between Statute and Rule.** The Supreme Court addressed an issue similar
26 to the one here in *Hinton v. Hotchkiss, supra* where it discussed inconsistencies between the
27 forcible entry and detainer statutes and the then new rules of civil procedure:
28

To hold that the forcible entry and detainer statutes have been superseded would preclude a speedy determination of a landlord's claim to possession. He would be forced to follow the procedures of an ordinary lawsuit with its attendant delays. Were it not for the disturbing effect (in this type of action) of this new Rule 13(a) (Section 21-437) there would be no doubt that a cross-complaint or counterclaim could not be asserted in an action for forcible detainer. 36 C.J.S., Forcible Entry and Detainer, § 28, p. 1168.

Hinton is still good law. In *Tri-City National Bank v. Grady*, *supra* at 312 P.3d 122 (App. 2015) the Court dealt with a claim that RPEA 17 should control over an alleged inconsistent provision in the forcible entry and detainer statutes. The Court stated:

. . . the procedural provisions of the FED statutes are an “integral part of the right itself and are not solely procedural,” and a procedural rule, even one subsequently enacted, cannot supersede or repeal a substantive right. *Hinton*, 65 Ariz. at 116, 174 P.2d at 753-54 (1946) (procedural provisions of FED statutes not superseded by rules of civil procedure); see also *Albano v. Shea Homes Ltd. P’ship*, 227 Ariz. 121, 137, ¶ 26, 254 P.3d 360, 366 (2011) (“We have repeatedly recognized that when a constitutionally enacted substantive statute conflicts with a procedural rule, the statute prevails.”).

The proposed pleading forms go beyond statutory requirements.

B. THE FIVE-DAY NOTICE

Controlling Statute. ARS § 33-1368 (B) provides in relevant part as follows:

B. . . . If rent is unpaid when due and the tenant fails to pay rent within five days after written notice by the landlord of nonpayment and the landlord's intention to terminate the rental agreement if the rent is not paid within that period of time, the landlord may terminate the rental agreement by filing a special detainer action pursuant to section 33-1377 (emphasis added).

All that the statute requires before filing an eviction action are that the notice: (1) advised that the rent was not paid; and (2) that if the rent was not paid within five days the landlord intended to terminate the rental agreement. *That is all the termination notice is*

1 *required by statute to say.*

2
3 Proposed RPEA 5 (b) (7), however would require the Complaint for eviction to:

4 State the specific reason for the eviction; that the defendant was served a
5 proper notice to vacate, if applicable; the date the notice was served; and
6 what manner of service was used. **A copy of the notice shall be attached**
7 **as an exhibit to the complaint, in the approved form as referenced in**
8 **Rule 20 of these rules shall be attached as an exhibit to the complaint**
(sic) (emphasis added).

9 The proposed rule thus imposes requirements going beyond statutory requirements.
10 The additional statements must be included in the notice form for it to be attached to the
11 Complaint even though those requirements do not appear in ARS § 33-1368 (B).

12 There may be those who believe that meeting the minimum requirements of the
13 statute does not give the tenant enough information and that fairness and justice requires that
14 more information be given. Many landlords agree and use forms that include some of this
15 information. They do so willingly, not because the law mandates it. But when a Court rule
16 adds requirements going beyond what the controlling statute requires, it is legislating from
17 the bench.
18
19

20 Another form of the legislating from the bench indictment is based on
21 perceiving the judiciary, as a responsive political forum for the general
22 public and specific interest groups . . .there is substantial evidence from
23 political science that some forms of interest representation and
responsiveness occur in judicial forums. 11 Lewis & Clark L. Rev. 185,
207 (2007)

24 The ACAJ is not satisfied with what the statutes require and wants more information
25 in the notice, with a penalty for noncompliance of dismissal. **These same comments apply**
26 **to all the forms and will not be repeated in the sections that follow.**

27
28 **C. THE TEN-DAY NOTICE**

1
2 **Controlling Statute.** ARS § 33-1368 (A) provides in relevant part as follows:

3 A. . . .if there is a material noncompliance. . . **the landlord may deliver a**
4 **written notice to the tenant specifying the acts and omissions**
5 **constituting the breach and that the rental agreement will terminate**
6 **upon a date not less than ten days after receipt of the notice if the**
7 **breach is not remedied in ten days** (emphasis added).

8 All this required is: (1) the notice specify the breach; and (2) it advise if the breach is
9 not remedied within ten days the rental agreement will terminate.

10 **D. THE FIVE-DAY NOTICE**

11 **Controlling Statute.** ARS § 33-1368 (A) provides in relevant part as follows:

12 If there is a noncompliance . . . with section 33-1341 materially affecting
13 health and safety, **the landlord may deliver a written notice . . .**
14 **specifying . . .the breach and that the rental agreement will terminate .**
15 **. . . not less than five days after receipt of the notice if the breach is not**
16 **remedied in five days. However, if the breach is remediable . . .and the**
17 **tenant adequately remedies the breach before the date specified in the**
18 **notice, the rental agreement will not terminate** (emphasis added).

19 All the statute requires is that: (1) the notice specify the breach; (2) it advise that if the
20 breach is not remedied within five days the rental agreement will terminate; and (3) if the
21 breach is cured within five days the rental agreement will not terminate.

22 **E. NOTICE OF REPEAT MATERIAL OR HEALTH AND SAFETY BREACH**

23 **Controlling Statute.** ARS § 33-1368 (A) provides in relevant part as follows:

24 If there is an additional . . . noncompliance of the same or a similar nature
25 during the term of the lease after the previous remedy of noncompliance,
26 **the landlord may institute a special detainer action pursuant to section**
27 **33-1377 ten days after delivery of a written notice advising the tenant**
28 **that a second noncompliance of the same or a similar nature has**
occurred (emphasis added).

All the statute requires is: (1) the notice specify the second noncompliance; and (2) it
advise the tenant faces eviction in ten days.

Moreover this form has a serious contradiction. There is no right to reinstate a tenancy when the eviction action is based on a second violation as is pointed out in the opening paragraph of the form that states, "the violation(s) cannot be fixed." But the bold language in the shaded box at the bottom of the form says "... in order to reinstate the lease you may be required to pay damages, attorney fees, and court costs."

F. MATERIAL AND IRREPARABLE BREACH NOTICE

Controlling Statute. ARS § 33-1368 (A) provides in relevant part as follows:

If there is a breach that is both material and irreparable. . . the landlord **may** deliver a written notice for immediate termination of the rental agreement and **shall** proceed under section 33-1377 (emphasis added).

The word "may" in the statute makes the notice optional but the ACAJ would make it mandatory, in effect amending the statute. The form is also contradictory. There is no right to reinstate for such a breach, as is pointed out in the opening paragraph: "the violation(s) cannot be fixed." But the bold language in the shaded box says "... to reinstate the lease you may be required to pay damages, attorney fees, and court costs."

G. THE SUMMONS FORM

Controlling Statutes. ARS § 33-1377 provides in relevant part as follows:

A. Special detainer actions shall be instituted for remedies prescribed in section 33-1368. **Except as provided in this section, the procedure and appeal rights prescribed in title 12, chapter 8, article 4 apply . . .**

B. The summons shall be issued on the day the complaint is filed and shall command the person against whom the complaint is made to appear and answer the complaint at the time and place named . . . (emphasis added).

ARS § 12-1175 provides in relevant part as follows:

1 A. When a party aggrieved files a complaint of forcible entry or forcible
2 detainer . . . summons shall issue no later than the next judicial day.

3 RPEA 5 (a) provides in relevant part as follows:

4 a. Summons. The summons . . . shall identify the defendants [and]
5 shall also include the following:

6 (1) Name of the court and its street address, city, and telephone
7 number;

8 (2) Date and time set for the trial of the matter;

9 (3) Notice that if the tenant fails to appear, a default judgment will
10 likely be entered against the tenant, granting the relief specifically
11 requested in the complaint, including removing the tenant from the
12 property; and

13 (4) A disclosure in substantially the following form: "Requests for
14 reasonable accommodation for persons with disabilities should be made to
15 the court as soon as possible."

16 (5) In residential property actions only, on a separate page served
17 upon the tenant, the information contained in the Residential Eviction
18 Procedures Information Sheet . . .

19 So all that is required is that the Summons be issued, command the defendant to
20 appear at a time and date and answer the Complaint, and contain information in RPEA 5(a).

21 ***H. THE COMPLAINT FORM***

22 **Controlling Statutes.** ARS § 12-1175 provides in relevant part as follows:

23 A. When a party aggrieved files a complaint . . . **in writing and under**
24 **oath**, with the clerk of the superior court or a justice of the peace,
25 summons shall issue no later than the next judicial day.

26 B. **The complaint shall contain a description of the premises** of which
27 possession is claimed in sufficient detail to identify them **and shall also**
28 **state the facts which entitle the plaintiff to possession and authorize**
the action (emphasis added).

RPEA 5(b) provides in relevant part that the complaint be verified and brought in the
legal name of the party claiming entitlement to possession of the property; include the

business name, if any, and address of the property; if an attorney represents the plaintiff, state the name, address, telephone number, and Bar number of the attorney in the upper left hand corner; if the plaintiff is unrepresented, state the plaintiff's address, name and telephone number in the upper left hand corner; state that the property in question is located within the judicial precinct where the complaint is filed; state in bold print, capitalized, and underlined at the top center of the first page, below the case caption, "YOUR LANDLORD IS SUING TO HAVE YOU EVICTED. PLEASE READ CAREFULLY"; state the specific reason for the eviction; state that the defendant was served a proper notice to vacate, if applicable; and give the date the notice was served and manner of service was. A copy of the notice shall be attached as an exhibit to the complaint.

RPEA 5(c) says if the complaint seeks a money judgment for rent, late charges, or other fees, charges or damages permitted by law, the complaint shall also state: the frequency with which the rent is to be paid; the due date for each payment; the amount of rent due on each date; the method of calculating late fees; the total amount of rents, late fees, and other fees, charges or damages permitted by law that are due on the date of filing; the nature and amount of any rent concessions; and the amount of attorney fees, if permitted by law or contract, that would be due to plaintiff in the event of a default by the defendant.

RPEA 5(d) says that if the action is based solely on non-payment of rent, contains a request for monetary damages and involves a residential property, it must also state that the defendant may contact the plaintiff or plaintiff's attorney and may reinstate the lease agreement and cause the eviction action to be dismissed if, prior to the entry of judgment, the defendant pays all rents due, any reasonable late fees due that are provided for under a

1 written lease agreement, and any court costs and attorney fees the plaintiff has incurred as
2 of the date the payment is made.

3
4 Also that if the complaint seeks a judgment for reasons permitted by law other than
5 the non payment of rent, it must state the reason for the termination of the tenancy with
6 specific facts, including the date, place and circumstances of the reason for termination.

7 Thus all that is required is that the Complaint contain the information required by in
8 RPEA 5(b) and (c).
9

10 ***H. THE JUDGMENT FORM***

11
12 **Controlling Statutes.** ARS § 33-1377 provides in relevant part as follows:

13 F. If the defendant is found guilty, the court shall give judgment for the
14 plaintiff for restitution of the premises, for late charges stated in the rental
15 agreement, for costs and, at the plaintiff's option, for all rent found to be
16 due and unpaid through the periodic rental period . . . and shall grant a writ
of restitution.

17 G. If the defendant is found not guilty, judgment shall be given for the
18 defendant against the plaintiff for costs, and if it appears that the plaintiff
19 has acquired possession of the premises since commencement of the action,
a writ of restitution shall issue in favor of the defendant.

20 ARS § 12-1178 provides in relevant part as follows:
21

22 E. If the defendant is found guilty of forcible entry and detainer or forcible
23 detainer, the court shall give the defendant notice that a defendant who is
24 lawfully served with a writ of restitution and who remains in or returns to
25 the dwelling unit . . . without the express permission of the owner of the
26 property or the person with lawful control of the property commits criminal
trespass in the third degree pursuant to section 13-1502.

27 RPEA 13 (b) provides in relevant part as follows:
28

(4) Stipulated Judgments. The court may accept a stipulated judgment, but only if the court determines that the conditions of Rule 13(a)(1)-(2) have been satisfied and the form to which the defendant stipulated contains the following warning: **Read carefully! By signing below, you are consenting to the terms of a judgment against you. You may be evicted as a result of this judgment, the judgment may appear on your credit report, and you may NOT stay at the rental property, even if the amount of the judgment is paid in full, without your landlord's express consent.**

Under these authorities, all that is required in the Judgment is that it identify the prevailing party, that it specifies the monetary awards, that it contain a warning about returning to the premises after service of the Writ, and that it contain stipulation language.

CONCLUSION

These commenting parties have previously disputed the authority of the judiciary to mandate forms for use by private landlords communicating with their customers (their tenants) just because they might wind up in court. They also challenged requiring specific pleading forms when alternative forms now used by practitioners are more attuned to statutory requirements and when the court forms exceed statutory requirements. Those comments still apply.

The scope of these comments is limited to the revised forms. As pointed out above, they all call for information not required by the relevant statutes. The pleading forms as a result are too long necessitating extensive redesign of software systems by landlords and landlord attorneys for no legitimate reason. Two of the notice forms have internal contradictions about the right of tenants to reinstate rental agreements for violations where the law does not provide for reinstatement.

1 In its November 10, 2016 Comments, the ACAJ analogized its eviction form proposal
2 with probate forms, noting that Supreme Court Administrative Order 2012-62 approved a
3 number of probate forms. That is not a correct analogy. No mention of probate forms is
4 made in that Order. It has become somewhat of an urban myth that imposing probate forms
5 sets some sort of precedent for now imposing mandatory eviction forms.

7 Forms that have been adopted in the Probate Rules that can be found by referring to
8 the Arizona Code of Judicial Administration (ACJA). The probate forms are not mandatory
9 except for those dealing with finance and accounting matters.

11 Specifically, the Order and Acknowledgment Forms (Forms 1–4, 10) are "preferred
12 forms." ACJA 3-302 states these forms "may be adapted to delete information that does not
13 apply to a particular case or to add other relevant information under the following
14 conditions: (i) All information in the preferred form and applicable to the case is included,
15 and (ii) The deletion of information in the preferred form, or failure to complete a portion of
16 the preferred form, constitutes a representation to the court and adverse parties the omitted
17 or unanswered questions or items are not applicable".

20 Only the Conservator Account Forms (Forms 5–9) are mandatory. They "are adopted
21 as the exclusive method for presenting such matters in the superior court..."


22 The ACAJ November Comments also refer to Administrative Order 2014-83 as
23 directing it (the ACAJ) to make the court system more accessible to self represented litigants
24 and to revise court rules and practices in order to accomplish that. A word search of the
25 Order reveals the words "form" or "forms" only appear twice, neither in the context of
26 imposing mandatory forms on lawyers or private businesses. The inferred mandate to do this
27 has become another urban myth.
28

1 The ACAJ rationale seems to be that its charter to help people gain access to the
2 courts empowers it to require specific forms to be used by private landlords and their
3 lawyers, and to refer to the probate forms as its precedent. But the probate forms are
4 generally not mandatory and allow for modifications to fit particular cases, while the
5 proposed eviction forms are to be mandatory without exception despite being legally
6 incorrect and exceeding the scope of the enabling statutes.

7
8 The purpose of this Proposal seems to be to seize control of the eviction process
9 including communications between landlords and their customers before evictions are even
10 considered. The underlying philosophy is consequentialism: even defective forms are okay if
11 the seizure can take place quickly. Errors can be fixed later.

12
13
14 **DATED:** February 17, 2017

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16 **Williams, Zinman & Parham, P.C.**

17
18 

19 By: Michael A. Parham
20 Melissa A. Parham

21 A copy of this comment has been e-mailed
22 this 17th day of February 2017 to:

23 Hon. Lawrence Winthrop
24
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28